IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2006-0043
	)	DEPARTMENT B
	)	
IN RE ESAU L.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17860401

Honorable Suzanna S. Cuneo, Judge Pro Tempore
Honorable Theodore J. Knuck, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By Dale Cardy
Tucson
Attorneys for State

Robert J. Hooker, Pima County Public Defender
By Susan C. L. Kelly
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Attorneys for Minor

B R A M M E R, Judge.

¶1 Esau L. appeals from the juvenile court's order adjudicating him delinquent for theft of a means of transportation and possession of burglary tools. Because Esau had been in the United States illegally and his deportation to Mexico was anticipated at the time

of the disposition hearing, the juvenile court placed him on unsupervised probation for a period of one year. Esau appeals his delinquency adjudication on both counts, claiming A.R.S. § 13-2305 is unconstitutional and the evidence was insufficient to support the juvenile court's findings that he had committed the charged acts. We affirm.

¶2 We view the evidence in the light most favorable to upholding the adjudication. *See In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). It is undisputed that someone unlawfully took the victim's car from its parking space at the victim's place of employment in Tempe, Arizona. Witnesses who had viewed a surveillance videotape of the parking lot testified the tape showed a person had taken the 1990 Honda Accord at approximately 8:05 p.m. on June 5, 2006. The victim testified that before the theft, he had operated the vehicle with a "regular Honda key" and that the car had contained neither a screwdriver nor a pair of vise grip pliers. The victim's place of employment was located approximately a five-minute drive from Interstate 10.

¶3 On the night of the theft, Arizona Department of Public Safety Officer Scott Hyatt spotted a Honda Accord traveling eastbound on Interstate 10 from Avra Valley toward Tucson at an excessive rate of speed. After radar equipment showed the vehicle was going eighty-nine miles per hour, Hyatt followed the car and "set a pace" with it, thereby determining it was traveling approximately 100 miles per hour. He then conducted a traffic stop.

¶4 Esau had been driving the car, but he had no driver's license; another juvenile was the only passenger. When Hyatt asked Esau to get out of the vehicle, Esau began displaying signs of nervousness, yelling to his passenger, and not "stand[ing] still." Esau spoke only Spanish to the passenger, and Hyatt could not understand what he was saying.

¶5 Inside the car, Hyatt discovered a pair of vise grip pliers and a screwdriver on the dashboard. Such tools, he testified, are known to be used by would-be car thieves "to . . . punch the ignition out." Other keys are sometimes then installed in the ignition in an effort to provide a "normal" appearance. A house key was in the Accord's ignition when Hyatt conducted the stop. While still at the scene, Hyatt learned a Tempe police officer was contemporaneously either taking the victim's report that the car had been stolen or was en route to do so.

¶6 "A person commits theft of means of transportation if, without lawful authority, the person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen." A.R.S. § 13-1814(A)(5). In addition, "[p]roof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft." A.R.S. § 13-2305(1). Pursuant to § 13-1814(B), that inference applies to prosecutions for theft of a means of transportation under § 13-1814(A)(5). Here, the state cited § 13-1814(B) in the

delinquency petition, and the prosecutor argued the applicability of the inference during the adjudication hearing.

¶7 We review the constitutionality of a statute de novo, presuming that it is constitutional. *State v. Stauffer*, 203 Ariz. 551, ¶ 16, 58 P.3d 33, 38 (App. 2002). On appeal, Esau contends that § 13-2305, as applied to him, unconstitutionally relieved the state of its burden of proof, shifted the burden of persuasion to him on an element of an offense, and stripped him of both the presumption of innocence and the right against self-incrimination to which criminal defendants are entitled under both the federal and state constitutions. In support of these claims, he cites *State v. Mohr*, 150 Ariz. 564, 724 P.2d 1233 (App. 1986), asserting with emphasis that a jury instruction at issue in that case was "**worded identically to [§ 13-2305(1)]**" and was found to have "impermissibly relieved the State" of its burden of proving all elements of the charged offenses beyond a reasonable doubt.

¶8 We reject Esau's argument because he misapprehends both the facts and the holding in *Mohr*, as well as the nature and operation of the statutory inference in § 13-2305(1). As the state correctly points out, the impermissible instruction in *Mohr* was not "worded identically" to the statute, as Esau claims. Although § 13-2305(1) provides that proof of possession of stolen property that is not satisfactorily explained "*may* give rise" to the inference in question (emphasis added), the fatal instruction in *Mohr* stated such proof "*gives rise* to the inference that the Defendant . . . was aware of the risk that [the property]

had been stolen or in some way participated in its theft." 150 Ariz. at 567, 724 P.2d at 1236 (emphasis added). It was actually the *Mohr* instruction's *deviation* from the permissive statutory language that prompted Division One of this court to reverse the defendant's convictions for theft and trafficking in stolen property because the directory language had, in fact, raised a "mandatory rebuttable presumption" that shifted the burden of proof to the defendant on an element of each offense. *Id.* at 568-69, 724 P.2d at 1237-38. However, far from determining that the terms of § 13-2305(1) are unconstitutional, as Esau implies, the *Mohr* court held "[a]n instruction based upon this statute will be constitutional *only if*" it retains the statute's permissive wording. 150 Ariz. at 569, 724 P.2d at 1238 (emphasis added).

¶9 We agree with the relevant analysis in *Mohr* and find that to whatever extent the juvenile court, as the trier of fact, might have applied the inference in § 13-2305(1) to this case, it committed no error. Because we presume the constitutionality of a statute, *Stauffer*, 203 Ariz. 551, ¶ 16, 58 P.3d at 38, and because the constitutional infirmity Esau sought to demonstrate does not, in fact, exist in the statute's wording, we neither reverse his adjudication for theft of a means of transportation nor find the statute unconstitutional.

¶10 Esau next challenges the sufficiency of the evidence to support his delinquency adjudications. We will reverse a delinquency adjudication for insufficient evidence only "if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d at 774. We will

not reweigh the evidence. *Id*. Nor will we judge the credibility of witnesses or resolve conflicts in their testimony because such tasks are "uniquely the province of the trial court, given its ability to observe the witnesses while testifying." *In re David H.*, 192 Ariz. 459, ¶ 8, 967 P.2d 134, 136 (App. 1998). "Substantial evidence" may be either direct or circumstantial and is such that a reasonable trier of fact "can accept as sufficient to infer guilt beyond a reasonable doubt." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003).

¶11 Esau argues his delinquency adjudication for theft of a means of transportation must be reversed because, even if the trial court properly applied the inference in § 13-2305(1), the evidence was nevertheless insufficient to show he knew or had reason to know the Accord was stolen. In support of this argument, he invites this court to resolve conflicts in the evidence, reweigh the evidence, and judge the credibility of witnesses. These actions are inconsistent with our role on appellate review.

¶12 The evidence showed that at virtually the same time the victim was reporting his car stolen, Esau was discovered by law enforcement officer driving the vehicle 100 miles per hour on an interstate that had been accessible in very close proximity to the location from which the car had been taken. On the dashboard of the vehicle were tools commonly used by car thieves, and in the ignition was a house key rather than a car key. Esau raised his voice and became nervous when confronted by the officer. Although one witness placed Esau in Tucson at a time shortly before the theft, the juvenile court apparently found her

testimony incredible. This evidence does not constitute the complete absence of probative facts necessary to justify reversal. The juvenile court clearly could find beyond a reasonable doubt that Esau either knew or had reason to know the car was stolen. *See, e.g., State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) (jury may infer requisite mental state from circumstantial evidence); *see also State v. Vann*, 11 Ariz. App. 180, 182, 463 P.2d 75, 77 (1970) ("What the defendant does or fails to do and what he says may be evidence of what is going on in his mind.").

¶13 Esau also challenges the sufficiency of the evidence to support his delinquency adjudication for possession of burglary tools in violation of A.R.S. § 13-1505. "A person commits possession of burglary tools by . . . [p]ossessing any . . . tool . . . adapted or commonly used for committing any form of burglary . . . and intending to use or permit the use of such an item in the commission of a burglary." § 13-1505(A). Burglary in the third degree includes "[e]ntering or remaining unlawfully in . . . a nonresidential structure . . . with the intent to commit any theft or felony therein." A.R.S. § 13-1506(A); *see also* A.R.S. § 13-1501(12) ("'Structure' means any . . . vehicle."). Hyatt had found those tools on the dashboard of the vehicle Esau had been driving immediately after it had been stolen. We have already found the evidence supported the juvenile court's finding that Esau had the requisite intent to commit theft of a means of transportation. The victim testified the vise grip pliers and screwdriver found on the dashboard of the Accord did not belong to him and had not been in the car prior to its theft. Hyatt testified such tools are commonly used to

steal cars. Accordingly, substantial evidence supports the juvenile court's apparent conclusion that Esau had possessed the screwdriver and vise grip pliers, which were burglary tools, either intending or permitting their use in furtherance of his entering or remaining unlawfully in the victim's vehicle with the intent to commit theft of a means of transportation, a felony.

¶14 Esau's adjudications and disposition are affirmed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge